78-1582

No. __________

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1978

STANLEY G. HARRIS, PETITIONER

v.

TOSHIO INAHARA, ROBERT L. KALEZ, LONGVIEW BOOMING CO., ROLAND BRUSCO, ALBERT STARR, JAMES A. WOOD, and GOLDEN KEY ASSOCIATES, a partnership

PETITION FOR A WRIT OF CERTIORARI
FROM DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Dennis H. Elliott
555 Benjamin Franklin Plaza
Portland, Oregon 97258

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Portland, Oregon 97204

INDEX

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PETITION FOR A WRIT OF CERTIORARI FROM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Stanley G. Harris prays that a writ of certiorari be issued to review the opinion of the United States Court of Appeals for the Ninth Circuit entered December 7, 1978, rehearing denied by opinion

entered January 16, 1979.

(a) OPINION BELOW

The opinion of the Court of Appeals has not been officially reported (see Appendix, <u>infra</u>). The petition for a rehearing and request for rehearing in banc was denied by order entered January 16, 1979.

(b) JURISDICTION

(i) The judgment of the Court of Appeals for the Ninth Circuit was entered on December 7, 1978.

(ii) Petitioner's motion for panel rehearing and rehearing in banc was denied by order entered January 16, 1979.

(iii) Jurisdiction of this court is invoked under 28 U.S.C. §1254(1) and 11 U.S.C. §47(c).

(c) QUESTIONS PRESENTED

1. Is the partnership relationship one of "fiduciary capacity" as that term is defined under §17(a)(4) of the Bankruptcy Act, 11 U.S.C. §35(a)(4)? Petitioner Harris filed a petition for bankruptcy and the Respondents herein challenged the dischargeability of the debt owed by Petitioner Harris to them. The bankruptcy court in its opinion held the debt arose out of a partnership relation between Petitioner and Respondents and under the applicable law the partnership relationship was not included in the "fiduciary capacity" language of §17(a)(4) of the Bankruptcy Act. On appeal to the United States District Court for the District of Oregon, the Court held the

"fiduciary capacity" of §17(a)(4) does include the common law partnership arrangement of the Respondents and Petitioner and as a result held the debt owed by Petitioner Harris to Respondents to be non-dischargeable. This was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit.

2. Do the fraud provisions of the Bankruptcy Act require proof of reliance on any misrepresentations by Petitioner, or is it sufficient that a "reasonable man" would have relied under the circumstances? The Respondents herein sought to have Petitioner's debt to them declared non-dischargeable on the basis that it constituted obtaining money by "false pretenses or false representations".

11 U.S.C. §35(a)(2). Respondents had obtained a judgment against Petitioner Harris in the State Court of the State of Oregon. This judgment was affirmed on appeal by the Supreme Court of the State of Oregon. The basis of obtaining the judgment was not proof of a fraudulent misrepresentation. At the trial in the bankruptcy court on the issue of the non-dischargeability of the debt, the Respondents introduced no new evidence, but instead relied on the transcripts of the state court judgment which they did introduce. The bankruptcy court held that no proof of reliance on any misrepresentations had been shown. The United States District Court for the District of Oregon held that actual reliance is not necessary, but

that it was only necessary to determine whether a reasonable man would have relied under the circumstances.

(d) STATUTES INVOLVED

Section 17 of the Bankruptcy Act, codified in 11 U.S.C. §35, provides impertinent part:

> "(a) A discharge in bankruptcy shall release a bankrupt from all of his proveable debts, whether allowable in full or in part, except such as ... (2) are liabilities for obtaining money or property by false pretenses or false representations ... (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity..."

(e) STATEMENT OF THE CASE

Petitioner Harris in this case organized a partnership, Golden

Key Associates, comprised of himself and the Respondents to purchase an apartment complex in Portland, Oregon. The apartment complex was subsequently purchased by the partnership from the builder. In the transaction the broker, International Realty, Inc., became entitled to a real estate commission of $100,000 and an escrow fee of $2,500. The Petitioner Harris was the president and owner of International Realty.

The Respondents sued Petitioner in the state court for the State of Oregon alleging that the payment to International Realty of the real estate commission and escrow fee constituted a violation of the fiduciary duty owed by Petitioner as a partner of the Respondents. The state

court held that International Realty and Petitioner Harris were liable to account to the partnership for the full amount of the funds appropriated by International Realty as a real estate commission on the transaction. This state court decision was affirmed in Starr v. International Realty Company, Ltd., 271 Or 396, 533 P2d 165 (1975).

Thereafter, Petitioner filed a voluntary petition for bankruptcy with the United States District Court for the District of Oregon. In March of 1975, Respondents herein filed a complaint in the bankruptcy court asking that the debt owed by Petitioner to Respondents arising out of the partnership litigation be

determined non-dischargeable.

At the hearing on Respondent's complaint for non-dischargeability, Respondents presented no new evidence, but instead relied upon the transcript they had compiled in the State Court proceedings. That transcript was introduced as evidence to support Respondents claims of non-dischargeability in the bankruptcy court proceedings. The Respondents claimed that the debt should be held non-dischargeable either because it involved obtaining money by false pretenses or false representations, 11 U.S.C. §35(a)(2) or was a debt created by the Petitioner's fraud, embezzlement, misappropriation or

defalcation was acting in a fiduciary capacity, 11 U.S.C. §35(a)(4).

The state court proceedings involved a suit for an accounting and a request that the commissions received by the Petitioner and his company be held in trust for the benefit of the remaining partners. The state court case did not involve a determination as to whether the Petitioner's conduct constituted fraud. The Oregon state court, including the Oregon Supreme Court on Appeal, held that Petitioner had an affirmative duty to explain fully the true facts of the transaction to his remaining partners and obtain their "informed consent" to any commissions

to be obtained by Petitioner's company.

The Bankruptcy Court for the District of Oregon held that the Petitioner, the partner of the Respondents, was not acting in a "fiduciary capacity" as that term has been limited in the application of the Bankruptcy Act.

The Bankruptcy Court also held that there was insufficient proof of clear and convincing evidence to show the necessary elements of fraud as contemplated in § 17(a)(2) of the Bankruptcy Act. The Bankruptcy Court opinion noted that there was no proof of reliance by the Respondents, no proof of a false representation, and no proof of fraudulent intent on the part of the Petitioner.

The Respondents then appealed

the decision of the Bankruptcy Court to the United State District Court for the District of Oregon. This appeal to the District Court was taken under the basis of 28 U.S.C. §1334 and 11 U.S.C. §67(c).

The District Court reversed the holding of the Bankruptcy Court and held that Petitioner, acting as a partner of the Respondents, was acting in a "fiduciary capacity" as that term is defined under the Bankruptcy Act. The District Court also held that actual reliance was not a necessary element of proof for Respondents to show obtaining money by false pretenses. The District Court held it was only necessary to determine whether a reasonable man would attach importance to the information in

question, and not whether the Respondents as the actual partners, relied on the "misrepresentation" or concealment. The District Court then held the debt to be non-dischargeable.

Petitioner then appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit merely held that the opinion of the District Court correctly concluded that the debt was non-dischargeable under the fraud provisions of §17(a)(2) and §17(a)(4) of the Bankruptcy Act. Petitioner's petition for rehearing and request for rehearing in banc was denied by the Ninth Circuit.

(f) REASON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. Meaning of "Fiduciary Capacity".

Since the term "fiduciary capacity" first appeared in the Bankruptcy Act in 1841, it has never been construed to encompass the fiduciary relationship which exists between partners. Every state and federal court and text writer which has addressed the subject has constitently held that the partnership relationship does not come within the "fiduciary capacity" terms of the Bankruptcy Act. 1A Collier on Bankruptcy §17.24(4) (14th Ed 1975); 8 Remington on Bankruptcy §3369, page 259(6) (1965); In Re Frazzetta 1 F Supp 122 (WD NY 1932), Inge v.

Stillwell, 88 Kan 33, 127 P 527 (1912); Gee v. Gee, 84 Minn 384, 87 NW 1116 (1901); Martin v. Starrett, 97 Neb 653, 151 NW 154 (1915); Anno: Bankruptcy-Discharge-Partner, 16 ALR 2d 1151.

The reason for excluding fiduciary relationship such as partnerships from the term "fiduciary capacity" was expressed in Davis v. Aetna Acceptance Co., 293 US 328, 333 (1934):

> "The meaning of "fiduciary capacity" has been fixed by judicial construction for very nearly a century. Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236, decided in 1844, is a decision to the effect that, within the meaning of a like provision of the Act of 1841 ..., a factor does not act in a fiduciary capacity; the statute 'speaks of technical trust, and not those which the law implies from the contract.' ...the

scope of the exception was to be limited accordingly. Through the intervening years that precept has been applied by this court in various situations with unbroken continuity. ... It is not enough, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong and without reference thereto."

The decisions of the Court of Appeals for the Ninth Circuit and the United States District Court for the District for the District of Oregon on appeal herein ruled that the partnership relationship comes within the "fiduciary capacity" language of the Bankruptcy Act. This Court has not decided whether the partnership relationship comes within the terms of "fiduciary capacity" as that term is used in the Bankruptcy Act. Various state courts and federal district

courts have confronted the questions and each has decided that the partnership relationship does not come within the Bankruptcy Act's definition of "fiduciary capacity". The reasoning for these decisions has been based on this court's decision in <u>Davis v. Aetna Acceptance Co.</u>, supra, and <u>Chapman v Forsyth</u>, 2 How. 202, 11 L. Ed. 236 (1844).

The decision of the District Court and the Court of Appeals effectively expand the scope of the term "fiduciary capacity" beyond that which was intended by Congress in passing the Act and by this Court as set out in <u>Davis v. Aetna Acceptance Co.</u>, supra, and preceeding cases.

2. <u>Common Law Fraud Proof Required Under Bankruptcy Act</u>.

The decisions of the District

Court and the Court of Appeals herein effectively dispense with the requirement of proof of reliance as an element of non-dischargeability based on obtaining money by false pretenses or fraud. The Ninth Circuit has previously recognized that Section 17(a)(2) of the Bankruptcy Act, 11 U.S.C. §35(a)(2) requires, among other things, the creditor seeking non-dischargeability of a debt must carry his burden of proof that the creditor relied on the misrepresentations. In Re Taylor, 514 F 2d 13 70, 1373 (9th Cir. 1975). This in accord with the recognized interpretations of the fraud provisions of the Act. 1A Collier on Bankruptcy, §17.16, page 1635 and 1636 (14th 1975).

The opinion of the District Court herein, as affirmed by the Court of Appeals for the Ninth Circuit, holds that reliance on the part of the Respondents need not be shown. The District Court held that it was only necessary for the person seeking non-dischargeability to show that a reasonable person would have relied under the circumstances. This reasonable man standard was borrowed by the District Court from the case law surrounding Federal Securities regulations. The District Court utilized the reasonable man standard described in Affiliated Ute Citizens v. United States, 406 US 128, 153-154 (1972) as support for the conclusion that actual reliance was not required under the Bankruptcy Act. Application

of this decision to the Bankruptcy Act is erroneous.

Allowing such a decision to stand will in effect amend the Bankruptcy Act to dispense with the requirement of the proof of reliance as an element of common law fraud. The District Court and the Court of Appeals for the Ninth Circuit in their decisions to hold that actual reliance is not an element to be shown under a request for non-dischargeability under §17(a)(2) of the Act. This is in contravention of established Bankruptcy Act decisions of the Ninth Circuit and involves a misapplication of the "reasonable man" standard set out in Affiliated Ute Citizens v. United States, supra.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that the writ for certiorari presented herein be granted.

Respectfully Submitted,

O'CONNELL, GOYAK, HAGEN,
ELLIOTT & KRAGE, P.C.

By: ______________________
Dennis H. Elliott
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re STANLEY G. HARRIS, Bankrupt.	Bankruptcy No. B75-416 OPINION
TOSHIO INAHARA, ROBERT L. KALEZ, LONGVIEW BOOMING CO., ROLAND BRUSCO, ALBERT STARR, JAMES A. WOOD, and GOLDEN KEY ASSOCIATES, a partnership, Plaintiffs, vs. STANLEY G. HARRIS, Defendant.	

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SOLOMON, Judge:

The plaintiffs appeal from a ruling by the Bankruptcy Judge that the plaintiffs' judgment debt against Stanley Harris, the defendant-bankrupt, for breach of a fiduciary duty was dischargeable in bankruptcy.

Before his adjudication as a bankrupt, Harris was engaged in many businesses. One of them, International Realty, Ltd. (International), specialized in tax-sheltered investments for

high-income taxpayers. Harris was the president and sole stockholder of International.

International organized partnerships to buy real property, primarily apartment and office buildings, to incur paper losses through accelerated depreciation and prepaid interest charges. As a sales tactic, Harris himself frequently invested in those partnerships to show potential investors that he had confident in the investment. The money that Harris invested generally came from part of the high brokerage fees that he charged on these transactions.

In 1968, Dave Christensen, Inc. (Christensen) offered to sell the

Golden Key Apartments (the apartments) for a net price of $907,500 - $207,500 in cash and the assumption of a $700,000 mortgage.

Haris organized the Golden Key Associates, a partnership, to buy the apartments. Harris was the managing partners. 1/ The other partners are the plaintiffs in this action; most of them are physicians. In December 1968, Harris signed a land sale contract for the partnership to purchase the apartments for $1,010,000. The contract provided that the partnership would make a $260,000 down payment as prepaid

interest.

In a separate agreement, which Harris concealed from the plaintiffs, Christensen agreed that International was to receive a broker's commission of $100,000 and an escrow fee of $2,500 out of the $1,010,000 sales price. This left Christensen with a net of $907,500 for the apartments.2/ Christensen also agreed to convey to International the vendor's interest in the Golden Key land sale contract.

Harris then collected $260,000 from his partners. He paid $207,500 to Christensen; this cash payment and the assumption of the $700,000 mortgage paid Christensen in full for the apartments. Harris paid the other

$52,500 to International.3/

Harris concealed from his partners, the plaintiffs here, the fact that his company, International, was getting $102,500 out of the deal and that International was also acquiring Christensen's interest in the land sale contract.

In 1970, when the partnership fell behind in its monthly contract payments, Harris threatened to foreclose the partnership interest in the apartments. The plaintiffs then learned for the first time that International owned the vendor's interest in the contract and that International had received $102,500 on the sale. The plaintiffs filed a state court action to require Harris to account to the partnership for the

$102,500 in commissions and to hold the title to the property in trust for them. They prevailed on both grounds.

The Oregon Supreme Court affirmed on the ground that Harris had violated his fiduciary duty to his partners under ORS 68,340(1):4/

> When, as in this case, a real estate broker undertakes to join as a member of a partnership or joint venture in the purchase of real property on which he holds a listing, he is also subject to the fiduciary duties of undivided loyalty and complete disclosure owed by one partner to another. Indeed, one of the fundamental duties of any partner who deals on his own account in matters within the scope of his fiduciary relationship is the affirmative duty to make a full disclosure to his partners not only of the fact that he is dealing on his own account, but all of the facts which are material to the transaction...
>
> .....
>
> In this case, Harris did not inform plaintiffs or disclose to them the fact that this property could have

been purchased for $907,500 "net" to the seller or that upon its purchase for $1,010,000 Harris or International (of which Harris was the president) would be paid a commission in the amount of $100,000. In the absence of such a disclosure there could be no effective "consent" by plaintiffs to the payment or retention by Harris of any such "benefit" from that transaction, for the purposes of ORS 68.340(1). Starr v. International Realty, 75 Adv Sh 811, 815-16 (1975).

Harris did not pay the judgment. In February 1975, he filed a voluntary petition in bankruptcy in which he listed debts of more than $4,800,000, including about $1,500,000 in unsecured obligations. He also listed his total assets at $1,231,000 -- his estimate of the value of certain personal property, most of which consisted of art objects. The $4,800,000 debt figure did not include unpaid federal and state income taxes,

even though Harris acknowledges that he has not filed income tax returns since 1969. Later, when an eight-count indictment was filed against him in federal court, Harris pleaded guilty to one count of "wilfully and knowingly" filing a "false and fraudulent income tax return."

In February 1975, the plaintiffs filed this action in the Bankruptcy Court to declare that their judgment against Harris was not discharged by his bankruptcy.5/

The complaint here alleged that the debt was nondischargeable under Section 17(a) of the Bankruptcy Act because it was "created by the bankrupt's fraud and by fraud,

misappropriation or defalcation while acting in a fiduciary capacity."

The plaintiffs submitted the case on the transcript of the state court proceedings and the judgment of the state court. They offered no life testimony. Harris did not offer any evidence.

Later, the plaintiffs moved to amend their complaint to specify the provisions of Section 17(a) on which they relied. The Bankruptcy Judge allowed the plaintiffs to specifically allege Sections 17(a)(2) and (4), but denied their request on Section 17(a)(8). 6/

The Bankruptcy Judge found that the plaintiffs failed to prove fraud under Section 17(a)(2), and he

held that Section 17(a)(4) was inapplicable because Harris was not acting in a fiduciary capacity when the debt was created. The plaintiffs' motion for rehearing was denied, and they appealed from the decision. I reverse.

I. Section 17(a)(2)

The plaintiffs contend that Harris's debt to them is nondischargeable under Section 17(a)(2) of the Bankruptcy Act, 11 U.S.C. §35(a)(2), because Harris obtained the money by "false pretenses of false representations" and by "willful and malicious conversion".

To prevail, the plaintiffs must prove fraud. The fraud must be

"positive fraud or fraud in fact, involving moral turpitude or intentional wrong; not implied fraud which may exist without bad faith." Forsyth v. Vehmeyer, 177 U.S. 177, 182 (1899); Wright v. Lubinko, 515 F.2d 260, 263 (9th Cir. 1975). This requirement of positive fraud is "consonant with equity and consistent with the object and intention of Congress in enacting a general law by which the honest citizen may be relieved from the burden of hopeless insolvency." (emphasis added) Neal v. Clark, 95 U.S. 704, 709 (1877).

Fraud may consist of concealment or intentional nondisclosure, as well as affirmative misrepresentation, of material facts,

Musgrave et al. v. Lucas et al., 193 Or 401, 410, 238 P.2d 780, 784 (1951), particularly when the parties stand in a confidential or fiduciary relation to one another. Starkweather v. Shaffer, 262 Or 198, 497 P.2d 358, 362 (1972).

The state court in Starr v. International Realty, supra, did not make findings on fraud because that action was based on breach of a fiduciary duty, not fraud. The court found that Harris had breached his fiduciary duty to his partners by not disclosing the $102,500 commission and escrow fee and by obtaining the vendor's interest in the land sale contract without the partners' consent.

Although the state court did

not make findings on fraud, the plaintiffs relied on the state court record to prove their fraud charge here; they introduced no other evidence.

On the basis of the state court record, the Bankruptcy Judge found that the plaintiffs did not prove fraud because they failed to prove one element, namely reliance.

I recognize that the party seeking nondischarge of a bankruptcy debt has the burden of proof. U.S. Fidelty and Guaranty Co. v. Tanner, 279 F. Supp. 396, 400 (D. Colo. 1968). I also recognize that a Bankruptcy Judge's findings are entitled to great weight and should be overruled only when they are clearly

erroneous. In my view, however, considering the totality of the evidence, the Bankruptcy Judge clearly erred when he found that the plaintiffs, to whom Harris owed a fiduciary duty, did not rely on Harris's concealment of his $102,500 fee and his receipt of the vendor's interest in the contract. Although it would have been preferable for the plaintiffs here to supplement the state court record with additional evidence on fraud, particularly reliance, a careful examination of the existing record requires the conclusion that Harris willfully and intentionally concealed material facts from his partners and that, if they had known the concealed facts, they would not have agreed to the terms of

the contract, and I so hold.

If any event, I do not believe if was necessary for the plaintiffs to prove actual reliance here because this is a case of concealment, not affirmative misrepresentation. It is only necessary to determine whether a reasonable man would attach importance to the concealed information in determining his course of action. An excellent statement of this principle is set forth in <u>Affiliated Ute Citizens v. United States</u>, 406 U.S. 128, 153-54 (1972), a securities case. There, the Supreme Court said that in a nondisclosure case

> ...positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the

> making of this decision. . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact."

This rule was applied by the Second Circuit in <u>Titan Group, Inc. v. Faggen</u>, 513 F2d 234, 239 (1975):

> . . .Unlike instances of affirmative misrepresentation where it can be demonstrated that the injured party relied upon affirmative statements, in instances of total non-disclosure, as in <u>Affiliated Ute</u>, it is of course impossible to demonstrate reliance, and resort must perforce be had to materiality, i.e., whether a reasonable man would attach importance to the alleged omissions in determining his course of action.

Under this reasonable man test, I do not think there is any question that the plaintiffs would have attached importance to Harris's $102,500 commission and escrow fee and to Harris's acquisition of the

vendor's interest in their contract; these facts were certainly material. If the plaintiffs had known these facts, it is unlikely they would have permitted Harris to take such a large commission or to acquire the underlying title to their property.

II. Section 17(a)(4)

In the alternative, the plaintiffs contend that Harris's debt to them is nondischargeable under Section 17(a)(4) of the Bankruptcy Act, 11 U.S.C. §35(a)(4), because it was created by Harris's "fraud, embezzlement, misappropriation or defalcation while acting . . . in any fiduciary capacity".

The Bankruptcy Judge held for Harris on the ground that when this

debt was greated Harris was not acting in a "fiduciary capacity", as that term is used in Section 17(a)(4). I disagree.

The courts have attempted to avoid making Section 17(a)(4) so broad that it reaches such ordinary commercial relationships as creditor-debtor and principal-agent.7/

The purpose of the Bankruptcy Act, as stated in Hamby v. St. Paul Mercury Indemnity Co., 217 F.2d 78, 81 (1954), "is to grant a discharge of honest debts to honest debtors, not to grant discharges to those who have dishonestly misappropriated funds entrusted to them."

I hold that Harris while acting in a fiduciary capacity,

deliberately concealed the fact that he had collected for himself $102,500 in violation of his obligation to his partners and that he also concealed the fact that he had acquired the vendor's interest in the contract in derogation of the rights of his partners.

This is not a case of a constructive trust or an innocent failure to divulge upon which the law imposes liability. This is a case of a flagrant violation of a fiduciary obligation. I therefore hold that Harris was acting in a fiduciary capacity under the Bankruptcy Act when his debt to the plaintiffs was created, and that, on the basis of my earlier finding of fraud, the debt is nondischargeable under Section

17(a)(4).

Because I have already held that the judgment debt is nondischargeable on two grounds, I need not decide whether the Bankruptcy Judge erred when he refused to permit the plaintiffs to assert nondischargeability under Section 17(a)(8) of the Bankruptcy Act.

The judgment of the Bankruptcy Court holding that the judgment debt owed by Harris to the plaintiffs was dischargeable in bankruptcy is reversed and the judgment debt is hereby declared to be nondischargeable.

Dated this 30th day of June, 1976.

United States
District Judge

1/ International has hired to manage the apartments for five per cent of the gross rentals.

2/ Harris designed the documentation of the transaction to conceal the benefits he received. Christensen was not concerned with how Harris handled the documentation as long as it got $907,500 from the sale.

3/ The balance of International's commission was to be paid out of overrides of the monthly mortgage payments.

4/ "Every partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

5/ Several other creditors filed compalints to exempt from discharge Harris's debts to them.

American Express Co. contended that Harris's $10,449 debt to it was for money obtained "under false pretenses and false pretenses and false representations in that [Harris] prepared and submitted to [American Express] fictitious charge slips with the intent to obtain money under false

pretenses." The parties settled that action by stipulating that $7,000 of the debt was nondischargeable.

Eight other creditors contended that Harris owed them more than $120,000, plus interest, because he induced them through fraud to buy certain real estate from him. The parties settled the action by stipulating that $127,000 was nondischargeable.

6/ Section 17(a) provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . .(2) are liabilities for obtaining money or property by false pretenses or false representations . . .or for willful and malicious conversion of the property of another;... (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; ... or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision."

7/ "If the act embrace such a debt [a factor retained the money of his principal], it will be difficult to limit its

application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoke of in the first section of the act." Chapman v. Forsyth et al., 43 U.S. 202, 207 (1844).

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of: STANLEY G. HARRIS, Bankrupt	
TOSHIO INHARA; ROBERT L. KALEZ; LONGVIEW BOOMING CO.; ROLAND BRUSCO; ALBERT STARR; JAMES A. WOOD; and GOLDEN KEY ASSOCIATES, a partnership Plaintiffs-Appellees, vs. STANLEY G. HARRIS, Defendant-Appellant.	No. 76-3307
TOSHIO INHARA; ROBERT L. KALEZ; LONGVIEW BOOMING CO.; ROLAND BRUSCO; ALBERT STARR; JAMES A. WOOD; and GOLDEN KEY ASSOCIATES, a partnership Plaintiffs-Cross Appellants, vs. STANLEY G. HARRIS, Defendant-Cross Appellee.	No. 76-3307 OPINION

Appeal from the United States
District Court for the
District of Oregon

Before: MERRILL and TANG, Circuit Judges, and TAYLOR, District Judge.*

PER CURIAM:

This is an appeal from the judgment of the district court holding that the state court judgment debt owing by appellant Harris to appellees was non-dischargeable under §17(a)(2) and (4) of the Bankruptcy Act.1/ Appellant contends that his debt to appellees is dischargeable and that said sections are not aplicable. There is also a cross-appeal from the order of the district court denying a motion of appellees to amend the findings.2/ The district court judgment was contrary to the ruling of

the bankruptcy court which held the debt dischargeable.

After a careful review of the record and the briefs of counsel, it is our opinion that the trial judge correctly concluded that the state court judgment debt owing by appellant to appellees was non-dischargeable under the fraud provisions of §17(a)(2) and 17(a)(4) for the reasons stated in his opinion. <u>In Re Stanley G. Harris</u>; <u>Inhara, et al. v. Harris</u>. F.Supp. _______ (D. Ore.________).

Affirmed.

* For the District of Idaho, sitting by designation.

1/ 17(a)(2) and (4) of the Bankruptcy Act is found at 11 U.S.C. §35(a)(2) and (4) and reads as follows:

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretenses of false representations, or for wilful and malicious injuries to the person or property of another . . . (4) or were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary cacpty;. . .

2/ The district court, in finding that appellees' state court judgment debt was non-dischargeable under 11 U.S.C., §35(a)(2), addresses only the fraud section, i.e., the "false pretenses or false representations" section. The district court did not rely upon or make any findings regarding the "wilful and malicious injuries" portion. The appellees' motion, requesting that the district court make findings in this regard, was denied.

IN THE UNITED STATES COURT

OF APPEALS

FOR THE NINTH CIRCUIT

TOSHIO INAHARA, ROBERT L. KALEZ, LONGVIEW BOOMING CO., ROLAND BRUSCO, ALBERT STARR, JAMES A. WOOD, and GOLDEN KEY ASSOCIATES, a partnership

Plaintiffs-Appellees,

vs. — No. 76-3307

STANLEY G. HARRIS,

Defendant-Appellant.

TOSHIO INAHARA, ROBERT L. KALEZ, LONGVIEW BOOMING CO., ROLAND BRUSCO, ALBERT STARR, JAMES A. WOOD, and GOLDEN KEY ASSOCIATES, a partnership,

Plaintiffs-Cross Appellants,

vs. — No. 76-3346

STANLEY G. HARRIS,

Defendant-Appellee.

O R D E R

Before: MERRILL and TANG, Circuit Judges, and TAYLOR, District Judge

Motion for leave to file late petition for rehearing is granted in so far as it seeks panel rehearing and denied in so far as it seeks rehearing en banc.

Rehearing denied.